

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN MAINS)
Claimant)
VS.)
)
DOW CONSTRUCTION COMPANY)
RELPH CONSTRUCTION)
Respondents)
AND)
)
ITT HARTFORD)
AETNA CASUALTY & SURETY COMPANY)
Insurance Carriers)

Docket No. 213,086

ORDER

Respondent, Dow Construction Company, and its insurance carrier ITT Hartford, appealed a preliminary hearing Order entered by Administrative Law Judge John D. Clark on September 24, 1996.

ISSUES

Respondent, Dow Construction Company, (hereinafter referred to as Dow) and its insurance carrier ITT Hartford, raised the following issues on appeal:

- (1) Whether the Administrative Law Judge exceeded his jurisdiction in conducting the hearing that is the subject of this appeal held on September 24, 1996.
- (2) Whether claimant sustained personal injury by accident that arose out of and in the course of his employment with respondent, Dow Construction Company.
- (3) Whether the Administrative Law Judge exceeded his jurisdiction when he entered this order that effectively reversed a previous order of the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

- (1) The Administrative Law Judge had the jurisdictional authority to conduct the September 24, 1996 hearing. The Appeals Board finds the September hearing was a continuation of the preliminary hearing held earlier on June 18, 1996. Therefore, respondent Relph Construction was not required to file a second application for preliminary hearing or serve upon respondent Dow written notice of intent to file such application. The Administrative Law Judge correctly ruled that the purpose of the September hearing was to reconsider the issues raised at the June hearing with the addition of new evidence.
- (2) The Appeals Board agrees with the Administrative Law Judge that the preliminary hearing record which was supplemented by the testimony of Russell Relph, owner of Relph Construction, proved that it is more probably true than not that claimant's right shoulder injury arose out of and in the course of his employment with respondent, Dow, on March 17, 1996. During the September 24, 1996, hearing the Administrative Law Judge had an opportunity to observe Russell Relph

testify in person. Mr. Relph established claimant notified him on May 1, 1996, that he had injured his shoulder working somewhere else just before he started working for Relph Construction on April 9, 1996. Mr. Relph denied claimant told him he had injured his right shoulder while working for Relph Construction. In addition, a review of the medical records admitted into evidence during the preliminary hearing held on June 18, 1996, do not contain a description of the second accident as alleged by claimant to have occurred while claimant was employed by Relph Construction. In fact, claimant's family physician, C.M. Miller, D.O., noted on a statement for services performed subsequent to claimant's alleged work injury while employed by Relph Construction, that claimant's right shoulder was treated and the type of insurance was "Workmans Comp. Dow Const."

The Administrative Law Judge had the unique opportunity to personally observe both the claimant and Mr. Relph testify in person. Therefore, the Administrative Law Judge had the opportunity to assess their credibility. The Administrative Law Judge made the finding in his Order that the testimony of Mr. Relph clearly showed the claimant did not suffer a new accident. Therefore, the Administrative Law Judge concluded Mr. Relph's testimony was more credible than the claimant's testimony. The Appeals Board, therefore, finds some deference should be given to the Administrative Law Judge's findings and conclusions. Accordingly, the Administrative Law Judge's Order assessing liability for claimant's right shoulder injury against the respondent, Dow, is affirmed.

(3) The Appeals Board entered an Order dated August 19, 1996, that reversed the Administrative Law Judge's first preliminary hearing Order dated June 18, 1996. The Appeals Board found, based on the state of the record at that time, that claimant, at the very least, temporarily aggravated his right shoulder while working for Relph Construction. The Administrative Law Judge in the preliminary hearing Order dated September 24, 1996, did find to the contrary, but that finding was based on a record that contained additional evidence. Therefore, the Administrative Law Judge did not exceed his jurisdiction when the September 24, 1996, preliminary hearing Order was entered because the Order was based on a different record.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated September 24, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
P. Kelly Donley, Wichita, KS
William L. Townsley, III, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director